

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA EDUCATION ASSOCIATION

and

KENOSHA SCHOOL DISTRICT

Case 162

No. 59731

MA-11389

(Victor Mitmoen Grievance)

Appearances:

Ms. Teresa M. Elguézabal, Legal Counsel, and **Ms. Mary E. Pitassi**, Legal Counsel, Wisconsin Education Association Council, and **Mr. Robert Baxter**, Executive Director, Kenosha Education Association, on behalf of the Association.

Davis & Kuelthau, S.C., Attorneys at Law, by **Mr. Clifford B. Buelow**, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein “Association” and “District”, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Kenosha, Wisconsin, on August 9, 2001, at which time the parties agreed I should retain my jurisdiction if the grievance is sustained. The hearing was transcribed and the parties subsequently provided written submissions that were received by January 22, 2002.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

Did the District have just cause to suspend grievant Victor Mitmoen for nine months pursuant to Article XIV, Section H, of the contract and, if not, what is the appropriate remedy?

BACKGROUND

Mitmoen, a technology education teacher, has been employed by the District since 1974, during which time he was never disciplined.

On March 23, 2000 (unless otherwise stated, all dates herein refer to 2000), Mitmoen was in the Lincoln Middle School computer lab with students M.T. and M.N. who were in the sixth grade. (In order to protect their identities, I have used initials in referring to these two students). Mitmoen was waiting for M.N. to finish certain school work when M.T., who was waiting for M.N. to finish so they could walk home together, threw a marble under a podium. M.T. then went under the podium to retrieve it. Mitmoen told him to get out from under the podium, but M.T. did not immediately do so. Mitmoen, who stands 6 feet, 4 inches tall and who weighs about 210 pounds, then went over to M.T., who is about 4 and a half feet tall and who weighed about 80 pounds, and grabbed him by the arm, which ultimately caused him to fall and hit a door that was several feet away. After hitting the door, M.T. swore at Mitmoen and walked away with M.N.

M.T. then related what happened to then-Principal Geraldine S. Cibrario and M.N. related what had happened to Vice-Principal Peg Modory. M.T. at that time had a big bruise on his left arm which was photographed.

Mitmoen shortly thereafter on March 23 related what happened to Cibrario (who no longer works for the District and who did not testify), and Modory. Modory testified that Cibrario took notes of their March 23 meeting (Joint Exhibit 8) and that they are accurate. Those notes state in pertinent part that Mitmoen then told them:

. . .

[M.N.] and Mr. Mitmoen were in the computer lab part of the technology room discussing a shed that [M.N.] wants to build at home. [M.T.] came into the room and Mr. Mitmoen heard a marble crash into the wall, hitting the heater. Mr. Mitmoen didn't see who threw the marble.

Mr. Mitmoen turned around to look and saw [M.T.] in the podium – digging out projects. A styrofoam football fell on floor. Mr. Mitmoen said he stood up and reached down and grabbed [M.T.] by the arm, pulled him out of the cabinet and launched him.

Mrs. Modory asked him exactly what he said. Mr. Mitmoen responded that he pulled him out of the podium and the next thing he knew he was on the floor. He restated again that he pulled [M.T.] out and did not know how he got on the floor. [M.T.] yelled at Mr. Mitmoen and then went into the hallway to follow him to see that he left area. Mr. Mitmoen said he called him Bitch repeatedly and that he was going to call the police as he left the room.

Mr. Mitmoen again stated he grabbed him and pulled him by one arm out of cabinet and doesn't know whether he tripped or fell to the floor. He comes into my room several times a week and he get into things. He was digging around in the students projects which he had to grade. He stated at that time, "I guess, I just lost it for a minute." and just yanked him out of the cabinet.

...

Modory testified as follows as to what Mitmoen told them on March 23:

Q What did he say?

A He told me that he had been helping M.N. plan a project, that he had problems with M.T. coming down to his classroom after school several times before. He said that M.T. first threw a marble into the classroom and then he saw M.T. rummaging in his podium touching students' projects, so he was talking like that. M.T. came into my classroom. I was working with M.N. I told M.T. that he needed to leave the room and M.T. said just a minute. I got up – then I got up, I took M.T. by the arm – and I am absolutely 100 percent certain of this – and then I launched him and I was certain of that because in my mind investigating this, immediately this situation became quite serious and I said to Mr. Mitmoen – I interrupted him and I said what did you say? He repeated then I launched him. Ms. Cibrario then said what do you mean by launched? And he said something like – he said I yanked him by the arm and then he said I didn't know that he would be so light. I guess I – I guess I must have lost it for a minute.

Modory also denied that Mitmoen used the word “launched” as part of any question.

After being asked to investigate the matter, the Kenosha Police Department on March 27 sent Police Officer Morrow and Detective Fredericksen speak to to M.T., M.N. and Mitmoen. (No criminal charges were ever filed over this incident).

Fredericksen that day prepared a report of their investigation (Joint Exhibit 18) which included M.T.’s following statement:

On 3/23/00, at about 4PM I went into Mr. Mitmoen’s class at school. The class is the tech lab. I threw a marble at my friend M.N. who was in the classroom because he threw a marble at me first. I went over by the podium and I was looking at the projects that the kids made that were on the bottom of the podium. Mr. Mitmoen got mad. He told me to “get out now.” I said “one minute.” Mr. Mitmoen grabbed me by my left arm and threw me into the door. I flew through the air and my feet were off the ground. My back hit the doors and the doors flew open when I hit them. I hurt my back and shoulder blades when this happened. I got a scrape and a red mark to my left arm. I cursed Mr. Mitmoen out. He said that he was sorry and that he didn’t know that I was that light. I went to the office and I told the principal Mrs. Cebrario and the Asst. principal about what happened. They looked at my arm and took pictures and they said they would follow procedure. The police were called and a police officer came. I didn’t go to school the next day because I was so sore all over especially my back and neck because of what happened.

M.N.’s statement to Detective Fredericksen provided:

On 3-23-00 at about 4 PM, I was in Mr. Mitmoen’s classroom at school. I had stayed after school to talk to him and I was the only one in the classroom besides Mr. Mitmoen. M.T. came in the room and I was rolling a marble around on the floor. The marble hit M.T. on the foot and M.T. picked up the marble and threw it against the floor. M.T. then went over to Mr. Mitmoen’s podium and he started going through it. Mr. Mitmoen told M.T. he get out of there and said, “What are you doing in there, I’m sick of you going through my things and not listening.” M.T. said “Just a minute.” Mr. Mitmoen said he was sick and tired of it and he grabbed M.T. by the arm and threw him across the room. M.T. actually flew in the air. His feet were off the ground and M.T. flew into the door when then flew open when he hit it. It looked like M.T. hit the door hard. M.T. then started swearing at Mr. Mitmoen and told him he was going to call the police. Mr. Mitmoen said something to M.T. like, “I’m sorry, I didn’t know you were that light.” M.T. went to the office to tell the principal and I followed him.

Mitmoen's statement to Detective Fredericksen provided:

On 3-23-00 after school around 4 PM, I was sitting at a computer in the classroom. M.N. was there because we were talking about building a shed. M.T. called to M.N. from the hallway "[M.N.], are you in there?" I didn't turn around. I continued working at the computer. M.T. and M.N. were arguing about a marble and who threw it at who. Then I heard commotion in my podium and I saw M.T. looking at different student's projects in the podium. I stood up, took M.T. by the arm and said "Get out of there." I pulled M.T. out of the podium and I yanked him out and the next thing I knew, M.T. was crashing against the door. I had no intention of launching him into the door. I did tell him that I was sorry and that I didn't realize he was that light. M.T. called me a bitch repeatedly, and he left. I asked him if he was sick and he showed me his arm. I saw a red mark on his arm.

Immediately below that statement was the following notation which Mitmoen signed:

I have made the above statement without any threats or promises. It is my desire to state the true facts as to this incident. I have read the above statement and find it is true and correct.

Witness: Cindy Fredericksen
#242 /s/

Signed: Victor L. Mitmoen /s/
Date: March 27, 2000

If your statement is not returned to our department at 1000 - 55th Street, Kenosha, Wisconsin 53140, in person or by mail within 5 days from the time of the complaint, your complaint will be cancelled.

Mitmoen on March 28, March 30, April 6 and April 14 subsequently met with various District administrators regarding the March 23 incident.

Superintendent Michael L. Johnson suspended Mitmoen with pay on March 27. He testified about the investigation he conducted into the March 23 incident and he informed Mitmoen by letter dated May 12 that he was recommending to the School Board that Mitmoen be terminated (Joint Exhibit 13).

Mitmoen by letter dated May 19 rebutted the charges contained in Johnson's May 12 letter (Joint Exhibit 15).

Johnson testified that he recommended Mitmoen's discharge because:

“I have been a superintendent of schools starting my – I am starting my 16th year. During that time, I have never come across a case this serious where a teacher is throwing a student across the room. I was concerned – gravely concerned about the issues around this case. I know from time to time, teachers are required in some cases to break up fights so they have to use a reasonable amount of force to break up fights. I know to restrain a student from either hurting the teacher themselves or to restrain a student from other actions that might be a problem with safety and health, welfare of the individuals around them, all of those are reasonable actions. I know that historically over the 28-year career, we at one time used to restrain students more and for specific reasonable reasons, but I have never been in a case where the facts have been presented before me of this nature and I believe the termination was a justifiable remedy to the issues in this case.”

The District’s Board on August 28 voted 3-3 as to whether Mitmoen should be fired. Because of that tie vote (which was predicated on certain legal advice), the District did not terminate Mitmoen.

Johnson by letter dated October 2 informed Mitmoen he was being suspended without pay for the rest of the 2000-2001 school year and that he would be reinstated for the 2001-2002 school year, provided that he undertake counseling. (Joint Exhibit 24). As for why he suspended Mitmoen for nine months of the 2000-2001 school year, Johnson stated:

Q I want to direct your attention to the third paragraph of your letter. It refers to your grave concerns about his misconduct and later on, you go on to say you are deeply concerned about his blatant lack of remorse at the termination hearing of August 28 and his inability or unwillingness to take responsibility for his actions. Do you see that?

A Yes.

Q What grave concerns did you have about his misconduct?

A Again, this kind of situation I have never come across before in my career. Having treated this student in this case, I think it would have caused greater injury. Those were all my concerns and fears. In addition to that, during both the grievance hearing and other contact I had with Mr. Mitmoen, I didn’t think that he demonstrated any remorse or indicated he’d never do it again. The strongest comment he ever made was during the termination hearing and that he was sorry that the

other students didn't have a qualified teacher before them. I didn't hear very much other than that as it relates to apologies or concerns about his own behavior.

Q Now during the termination hearing, did Mr. Mitmoen read Exhibit 15 which is his May 19, 2000 response to the charges leading up to termination – supporting termination?

A I recall everybody providing Mr. Mitmoen with an opportunity to read a lengthy letter responding to each of the items and charges.

Q Did his statements contained in this Exhibit 15 in any way have any effect on you with regard to your conclusion that he showed a blatant lack of remorse?

A I would say that the context and the manner in which that presented caused me that concern, yes.

Mitmoen testified that he told M.T. to get out from under the podium; that M.T. replied, "Wait a minute"; that he then walked over to M.T. "and pulled him out of the cabinet with my left hand" and "let go of him"; and that M.T. then "fell forward into the door." He said that he "felt no resistance at all" from M.T. when he did so; that he tried to assist M.T. after he hit the floor; and that M.T. at that time showed no injuries. As for his subsequent meeting that day with Cebrario and Modory, he claimed that he there stated, "So I launched him?", and "That is how I meant it, in a question."

Mitmoen grieved his suspension (Exhibit 25), which was unanimously denied by the District's Board.

POSITIONS OF THE PARTIES

The Association claims that the District lacked just cause to suspend Mitmoen for nine months because his suspension "at the very least, should be greatly reduced because it is excessive given the nature of the offense", "given the discipline it issued in two factually similar cases", "given the disparity between what the District said it was disciplining Mitmoen for, and what actually happened", and "given Mitmoen's 26-year record of service to the District, and the absence of discipline." The Association also asserts that the nine-month suspension "was actually a *de facto* termination" and that it did not allow Mitmoen to take full advantage of the educational nature of the suspension. As a remedy, it asks that Mitmoen be made whole by paying to him all the wages and benefits he lost because of his unpaid suspension.

The District contends that it had just cause to suspend Mitmoen because he admitted to others that he “launched” M.T., thereby causing M.T. to suffer bodily injury when he hit the door, and that its suspension was “neither arbitrary nor capricious” and that it thus must be sustained. The District also asserts that Mitmoen’s suspension is justified because the initial statements given by Mitmoen, M.N. and M.T. “are consistent and damning with regards to Mitmoen’s conduct”; that the statements of other witnesses are consistent and hence should be credited over Mitmoen’s testimony; that it imposed lesser discipline in prior incidents involving corporal punishment because the misconduct there was not as serious as the misconduct here; and that there are no mitigating factors here warranting a lesser discipline. The District also asserts that its suspension was “not a *de facto* termination”; that the District’s Board in any event approved the suspension when it unanimously denied Mitmoen’s grievance; and that it properly ordered Mitmoen to obtain counseling.

DISCUSSION

Much of this case centers on whether Mitmoen in fact “launched” M.T. on March 23, with the District claiming, and Mitmoen denying, that he did so. This is a crucial factual issue because it helps establish just how much physical force Mitmoen exerted against M.T. at that time.

M.T. and M.N. did not testify in this proceeding. Hence, their written and oral hearsay statements to others, standing alone, do not establish whether Mitmoen “launched” M.T. However, their statements can be used to corroborate Mitmoen’s own March 27 admission to the Kenosha Police that: “I had no intention of launching him into the door.” (Joint Exhibit 18) (Emphasis added). M.T. that day also told the police, “I flew through the air and my feet were off the ground”, and M.N. told police, “M.T. actually flew in the air.”

These three statements are consistent with then-Principal Cibrario’s note that Mitmoen on March 23 told her and Modory that he “pulled [M.T.] out of the cabinet and launched him.” (Joint Exhibit 8). In addition, I credit Modory’s testimony that Mitmoen on March 23 admitted that he “launched M.T.”.

The Association asserts that other parts of the record contradict all this and that Mitmoen did not actually throw M.T. into the air. I disagree. Modory’s credited testimony and Mitmoen’s own admissions to Cibrario, Modory, and the Kenosha police all establish that he “launched” M.T.

The Association also claims that Mitmoen “used the word ‘launched’ giving little or no indication of what he meant by it” because he is “not an English teacher” and because he only meant “to ask it as a question.” I disagree. One does not need a Ph.D. in English composition to understand that the word “launched” means that something has left the ground

as it flies through the air, which is exactly what happened to M.T. Moreover, I discredit Mitmoen's claim that he used the word "launched" as part of a question in his March 23 meeting with Cibrario and Modory, as I credit Modory's testimony that Mitmoen categorically used that word without asking a question.

Mitmoen's own cross-examination establishes another reason to discredit his claims, as he admitted there was not even any reason to touch M.T. because he was already getting up from underneath the podium. That being so, the District correctly points out: "There is NO force which Mitmoen was required to use under the circumstances, and there was NO force which Mitmoen was permitted to use under the circumstances." Mitmoen also claimed that he was "confused" and "flustered" when he spoke to Cibrario and that, "I would consider myself puzzled as to how the situation happened", which is hardly credible. He also admitted that his statement to police, which he read before he signed it, differed from his testimony here because, "That is the way they have written it down, but that is how it happened", which again is hardly credible given Mitmoen's own signature at the bottom of his statement. He further claimed that he did not actually see M.T. "crashing against the door" and that "I didn't know whether he hit the door or not", even though his own signed statement states otherwise. He further claimed that he was in a "brainstorming mode" when he met with administrators, and that is why he asked them whether they believed M.T. was "launched". Modory's credited testimony establishes otherwise. He also vacillated over whether he grabbed M.T.'s right arm or left arm and replied, "I don't know" when asked why he had his right arm on the podium. Given this niagara of contradictory statements, it simply is impossible to credit any of Mitmoen's disputed testimony.

I therefore find that Mitmoen used grossly excessive physical force against M.T. and that he thereby violated the District's Corporal Punishment/Use of Physical Force Policy (Joint Exhibit 23). If the District had terminated Mitmoen for such gross misconduct, his discharge would be sustained. Since the District instead imposed a lesser discipline by suspending Mitmoen, albeit for an extraordinarily long time, it follows that the District had just cause to do so.

I also find that Mitmoen's 26 years of service does not warrant any mitigation of his long suspension and that Johnson's October 2 letter of suspension to Mitmoen (Joint Exhibit 24) contained sufficient grounds for that suspension even though some of the grounds given for Mitmoen's suspension were not valid. The sheer brute force of Mitmoen's action also far exceeded the other two cases relied upon by the Association where teachers Donald Kirby and Angela Ruffalo received lesser discipline for committing far lesser violations of the District's corporal punishment policy and which did not involve "launching" any students into the air.

In light of the above, it is my

AWARD

1. That the District had just cause under Article XIV, Section H, of the contract to suspend grievant Victor Mitmoen for nine months.

2. That this grievance is therefore denied.

Dated at Madison, Wisconsin, this 30th day of April, 2002.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

